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No. 94-___

In the

Supreme Court of the United States

October Term, 1994

WILLIAM E. KIRWAN, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourteenth Amendment prohibits a state university from spending one percent of its financial aid budget on a race-based merit scholarship program when (a) the university had been racially segregated for almost a century and actively resistant to integration for at least twenty years thereafter, (b) the program was part of a statewide response to the United States Department of Education's findings of discrimination in Maryland's entire higher education system, and (c) the program has no appreciable adverse effect on any student.

2. Whether this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), permits a university to advance its compelling interest in student diversity by adopting a race-based scholarship program that does not have any adverse impact on the admission of any student.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Daniel J. Podberesky (appellant below); William E. Kirwan, President of the University of Maryland at College Park; the University of Maryland at College Park; Monica Green; Maudlyn George, on her own behalf and on behalf of her daughter Allison George; Eileen Heath; Richard A. Dalgetty; Gerard W. Henry; Maisha Herren; Aletha S. McRae, on her own behalf and on behalf of her daughter Daletha McRae; and Charles L. Smith, III, on his own behalf and on behalf of his son Charles Smith, IV (appellees below).

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PETITION FOR A WRIT OF CERTIORARI

William E. Kirwan, President of the University of Maryland at College Park, and the University of Maryland at College Park (collectively "the University" or "UMCP") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The October 27, 1994 opinion of the United States Court of Appeals for the Fourth Circuit is reported at 38 F.3d 147 and is reproduced in the Appendix ("App.") at 1a-29a. The court of appeals' December 30, 1994 order denying petitioners' request for rehearing and suggestion

for rehearing in banc is reported at 46 F.3d 5 and is reproduced at App. 30a-33a. The November 22, 1993 opinion of the United States District Court for the District of Maryland is reported at 838 F.Supp. 1075 and is reproduced at App. 34a-95a. The January 31, 1992 opinion of the court of appeals is reported at 956 F.2d 52 and is reproduced at App. 96a-108a. The May 15, 1991 opinion of the district court is reported at 764 F.Supp. 364 and is reproduced at App. 109a-138a.

JURISDICTION

The court of appeals' opinion and judgment were entered on October 27, 1994. The order denying petitioners' timely filed petition for rehearing and suggestion for rehearing in banc was entered on December 30, 1994. This petition is filed within 90 days of that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 42 U.S.C § 1981. The text of these provisions is reproduced at App. 221a.

STATEMENT OF THE CASE

1. Proceedings Below.

This petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit, which prohibits the University of Maryland at College

Park from offering a blacks-only scholarship program to rectify present effects of its past discrimination against blacks and to achieve diversity in its student body.

Respondent Daniel J. Podberesky, an Hispanic student at UMCP, filed this lawsuit in June of 1990 in the United States District Court for the District of Maryland, claiming that the Benjamin Banneker Scholarship Program ("Banneker Program") violated his civil rights under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), the Fourteenth Amendment, and 42 U.S.C. § 1981. The district court initially granted summary judgment in favor of defendants in 1991. 764 F.Supp. 364 (D.Md. 1991) (App. 109a). The district court held that the Program was justified because it was implemented in response to findings of the Office for Civil Rights ("OCR") of the Department of Education, which determined that the State maintained a racially-segregated higher education system that had to be dismantled. The court also held that the Program was narrowly tailored to remedy the effects of the past discrimination. (App. 122a-133a.)

The court of appeals reversed. 956 F.2d 52 (4th Cir. 1992) (App. 96a.) The court stated that "[o]nce a court has determined that a state has proceeded upon strong evidence of discrimination in other than the immediate past, the inquiry into the legitimacy of a race-based classification turns to the state's basis for finding continuing effects of such past discrimination." (App. 104a.) The court remanded for a determination of whether there is "some present effect of . . . past discrimination that the program is designed to redress," and whether the Program is narrowly tailored to remedy that effect. (App. 106a.)

In response to the court of appeals' decision, the University initiated a fact-finding process, pursuant to its authority under Maryland law,[1] to determine whether to continue the Banneker Program. Following the submission of extensive evidentiary materials from a number of parties and a public hearing in which respondent's counsel participated, the University issued a 61-page Decision and Report on April 26, 1993. It found that there are present effects of both the University's and the State's past discrimination against blacks, and that the Banneker Program is narrowly tailored to remedy those present effects. (App. 139a.) The University also found that the Banneker Program directly advances the interest of promoting student diversity. (App. 213a.)

After several black students at the University intervened as defendants in the district court action and additional discovery was taken, the parties submitted cross-motions for summary judgment. The University submitted evidence of several continuing effects of its past discrimination, and also introduced affidavits of educators from across the country who emphasized the importance of race-based scholarships in attaining student diversity. Following a hearing, the district court granted summary judgment for the University. 838 F.Supp. 1075 (D.Md. 1993) (App. 34a).

The district court found it unnecessary to address the University's diversity argument because the court held that continuing effects of the University's past discrimination fully justified the Program. The court found the evidence offered in support of those present effects to be "succinct, startling and undisputed." (App.

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[1] *See* Md. Educ. Code Ann. §§ 10-204; 11-105(e); 12-106 - 12-109 (1992 Repl.Vol., 1993 Cum.Supp.).

63a.) The district court first engaged in a thorough review of the history of the University's and the State's discriminatory treatment of blacks in higher education. (App. 36a-49a.) The court then found that the University had a "strong evidentiary basis" for finding four present effects of this unlawful discrimination: (1) a negative reputation in the black community, (2) an underrepresentation of blacks at the University, (3) low retention and graduation rates for blacks at the University, and (4) a campus climate hostile to blacks. (App. 51a-81a.) The district court concluded that the Banneker Program "serves to enhance UMCP's reputation in the African-American community, increase the number of African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus." (App. 83a.) The court also concluded that alternative programs were less effective than the Banneker Program, and that the program did not adversely affect the admission or scholarship opportunities of non-blacks. (App. 82a-88a.)

Podberesky appealed, and the court of appeals reversed. 38 F.3d 147 (4th Cir. 1994) (App. 1a) (*Podberesky II*). The court of appeals first noted that the Banneker Program, although adopted to remedy an undisputed history of discrimination, was "burdened with a presumption" of invalidity. (App. 6a.) The court then proceeded to reject as insufficient each of the four present effects advanced to support the program. The court held that the University's adverse reputation in the black community and the existence of a hostile campus climate for blacks could not, as a matter of law, justify a race-conscious remedy. (App. 9a-13a.) It then found that the district court erred in finding that there were no material factual disputes with respect to whether the other two

proffered effects -- underrepresentation and low retention and graduation rates -- were caused by prior discrimination. (App. 14a-18a.) Notwithstanding the court of appeals' finding that there were material factual disputes, however, the court directed the entry of summary judgment against the University on the ground that, assuming there were present effects of past discrimination, the Banneker Program was "not narrowly tailored" to remedy those effects. (App. 19a.)

The court of appeals did not address the University's request for a remand to enable the district court to address the University's diversity justification for the Banneker Program. By a vote of 8-3, the court of appeals denied the University's petition for rehearing and suggestion for rehearing in banc. (App. 30a.)

2. Statement Of Facts.

a. Maryland's History Of Discrimination Against Blacks In Higher Education And At UMCP.

Observing that "[t]he history of African-American higher education in Maryland before *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) is typical of most southern states" (App. 36a), the district court stated that "Maryland's policy towards the education of its black citizens was characterized by the reluctant establishment of institutions of higher education for blacks that were segregated, vastly underfunded and consistently neglected." (*Id.*) Instead of integrating or enhancing existing State institutions, the legislature allocated money to create scholarships for blacks to attend colleges outside of the State for undergraduate and graduate programs not available for blacks in Maryland.

See University of Maryland v. Murray, 169 Md. 478, 485, 182 A. 590, 593 (1936).[2] The awards were minimal, however, and most Maryland blacks were left with limited course offerings available at Maryland's four black colleges.

In 1945, the Maryland Commission on Higher Education "recommended that African-Americans be admitted to the state's all-white graduate schools and that funding for all-black colleges be increased to parity with that of the white schools." (App. 37a.) In response, Harry "Curley" Byrd, the president of UMCP, "agreed that funding should be equalized but was vehemently opposed to integrating the University's graduate and professional schools." (*Id.*) (footnote omitted).

Four years later, UMCP's president "recommended privatizing UMCP rather than allowing black graduate students to enroll there." (App. 38a) (footnote omitted). As the district court noted, his "suggestion was rejected and UMCP admitted its first black graduate student in 1951. Any further debate over the propriety of integrating the University of Maryland system was mooted by *Brown v. Board of Education*." (*Id.*) (footnote omitted).

After *Brown*, UMCP officials voted to remove the express restrictions on black enrollment, but the University remained resistant to desegregation measures and stayed virtually all white through the late 1960s. For example, UMCP officials imposed a number of requirements that "served to exclude African-Americans

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[2] The plaintiff's attorney in this case was Thurgood Marshall, who previously had been denied admission to the University's law school solely because of his race.

who might have otherwise been admitted during the first years after *Brown*." (App. 38a-39a) (footnote omitted). "Similarly, in 1960, when the Governor proposed a complex plan to accommodate the growth of UMCP by converting several regional state colleges into additional branches of the flagship campus, no all-black colleges were considered for conversion, thus preserving the segregated character of College Park." (App. 39a) (footnote omitted). "Most importantly," the district court observed, "UMCP simply made no effort to recruit African-American students." (*Id.*) The campus climate for black students ranged from passively inhospitable to openly hostile. (App. 39a-40a.)[3] The result, the district court noted, was predictable: "[c]onsidering UMCP's institutional indifference to integration and the hostility of the campus climate, it is not surprising that black student enrollment stayed below 1% of the undergraduate population from 1954 until the end of the 1960s." (App. 40a.)

In 1969, the United States Department of Health, Education and Welfare's Office for Civil Rights ("OCR") found that the State of Maryland was operating a racially-segregated system of higher education in violation of Title

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[3] The district court noted that "a faculty committee refused to allow students to form an on-campus chapter of the Congress for Racial Equality," that "the University discouraged Martin Luther King, Jr. from speaking on campus" but "permitted George Wallace," who "attracted the largest crowd in the history of the University," and that "[o]ff-campus housing was completely segregated and when an integrated dormitory was established for a summer 'citizenship' program in 1966, the Ku Klux Klan marched in protest." (App. 39a-40a.)

VI of the Civil Rights Act of 1964. (App. 110a.)[4] The State and the University began to take steps to desegregate, but OCR repeatedly found those measures to be insufficient. (App. 41a-46a.) As the district court explained, "the University's disinterest in attracting black students spilled over into the Admissions Office," the University was guilty of "financial neglect of the needs of African-American undergraduates," and "hostility toward minority recruitment existed at the highest levels of the University administration." (App. 43a.)[5]

In 1973, OCR found that the State "was not successfully desegregating UMCP," that "the colleges in the Maryland State University system still retained duplicative programs and that the areas of specialization at historically black colleges reflected stereotypical notions of what were considered appropriate careers for African-Americans." (App. 44a) (footnote omitted).[6] The district court also noted that even as a subsequent

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[4] *See also Adams v. Richardson*, 356 F.Supp. 92, 94 (D.D.C.), *modified*, 480 F.2d 1159 (D.C.Cir. 1973).

[5] The district court noted that "[w]hen the Chancellor's Committee on Minority Education pressured UMCP to step up minority recruitment and retention efforts and to increase the amount of financial aid available to minority students, the administration dismissed the Committee's report as 'abusive, fuzzy, non-realistic and non-constructive' with recommendations that 'sound like a parody.'" (App. 43a-44a.)

[6] OCR found that in contrast to the doctoral and professional programs offered at UMCP and another historically white university, "the state's traditionally black colleges were given undergraduate programs designed to train their students to work within a population of criminals and persons with mental and physical deficiencies." (App. 44a.)

desegregation plan "was being implemented and as OCR developed criteria for Title VI compliance, the University took actions that hindered its own efforts at desegregation." (App. 46a.) "Not surprisingly, in 1978, after developing criteria for Title VI compliance, OCR once again concluded that Maryland was not taking sufficient action to desegregate its institutions of higher learning." (*Id.*) (footnote omitted).

Summarizing the University's pre-*Brown* and then post-*Brown* discrimination against blacks, the district court concluded that the University did not make any "genuine progress towards eliminating its single race status" until the late 1980s (App. 49a) (footnotes omitted):

> Whether manifested by the overtly racist comments of [former UMCP President] "Curley" Byrd, the absolute neglect of black recruiting during the sixties, the underfunding of African-American facilities, the institutional hostility towards the administrative units at UMCP responsible for desegregation, or the constant squabbling with the OCR, the University demonstrated at worst contempt for and at best grudging acceptance of its constitutional obligation to desegregate. It was only in the late 1970s, with the advent of the Banneker Program, that UMCP finally began to take meaningful steps towards integrating its campus. Indeed, it is only since the late 1980s that the University has made any genuine progress towards eliminating its single race status.

In 1985, pursuant to a court-approved agreement dismissing litigation between OCR and the State,[7] Maryland agreed to a five-year higher education desegregation plan. An approved component of that plan was the use of race-targeted scholarships, which included programs such as the Banneker Program. (App. 47a-48a.) Respondent applied for admission to the University in the last year of the plan.

The University is awaiting OCR's final determination whether the State has achieved compliance with federal law. As the district court noted, "the United States' amicus brief argues that Maryland still operates a dual system of higher education . . . ." (App. 48a n.42.)

b. The Banneker Program.

Facing continuing pressure from OCR, UMCP officials concluded in 1979 that a minority merit-based scholarship program was needed to change entrenched attendance and retention patterns of black students. The result was the Benjamin Banneker Scholarship Program. As one University official testified, "black high school students chose not to come to UMCP because of its history and reputation of segregation." (J.A. 3129.)[8] The Banneker Program was intended to help change the perception that blacks did not have successful experiences at UMCP, to improve the climate for black students, and ultimately to increase retention and graduation rates of all black students, not just those receiving the Banneker

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[7] *Hughes v. United States Dept. of Education*, Civ. No. 76-01 (D.Md. June 3, 1985).

[8] References to "J.A." are to the Joint Appendix filed in this case with the Fourth Circuit.

awards. (J.A. 3089; 3130.)[9]

As the district court stated in its first decision, OCR not only was aware of the Banneker Program, but "in fact suggested expanding it in 1985." (App. 128a n.10.) The Program originally was open to all minority students with a strong emphasis on blacks, but few non-blacks received Banneker Scholarships and UMCP found that presenting the Program as open to minorities generally reduced its effectiveness in attracting black applications. The University in 1988 limited the Program to blacks to advance the Program's original purpose more effectively. (App. 48a n.41.)

Banneker scholarships offering full financial support are given to 20 to 30 entering students a year. As the district court noted, the 1985 desegregation plan that the State submitted to OCR "included specific reliance on the Benjamin Banneker Scholarship Program as one of UMCP's most important recruitment efforts." (App. 47a.)

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[9] The Benjamin Banneker Scholarship Committee was formed in 1979 and developed selection criteria, which included not only GPA and SAT scores, but also consideration of extra-curricular activities, leadership experience, academic and career goals, and experiences with racism -- factors the Committee determined would best predict a black student's academic success at UMCP. (J.A. 3089-91.) These criteria corresponded with expert research conducted at UMCP regarding factors that predict success for black students at predominantly white institutions. (J.A. 1428-41.)

REASONS FOR GRANTING THE WRIT

This case presents issues of overriding legal and social significance that fundamentally affect higher education institutions across the nation. Numerous colleges and universities award race-exclusive scholarships, based on the same rationale as the University of Maryland's program, to more than 45,000 students annually. *See* 56 Fed. Reg. 64548 (1991).[10] The United States Department of Education just last year provided its strong endorsement of these programs in appropriate circumstances. *See* 59 Fed. Reg. 8757 (1994). Moreover, the Department's Office for Civil Rights played a crucial role in the implementation of the Banneker Program, and the Department of Justice defended the Program in the court below. The court of appeals' decision calls into question the validity of all such programs, as well as the policy of the Department of Education.

The widespread adoption of these programs, and the United States' endorsement of them nationally and in this case, reflect a recognition that race-based scholarships are of critical importance in eradicating the effects of past discrimination and in ensuring the benefits of a diverse student body. These programs advance the goal of equal educational opportunity at little or no cost to any value of constitutional dimension. As the district

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[10] More than 60% of the country's undergraduate colleges and universities responding to surveys of the United States General Accounting Office and the American Council on Education indicated they award scholarships for which minority status is an eligibility requirement. *See* United States General Accounting Office, *Information on Minority-Targeted Scholarships*, January 1994, at 57 (Table III.2).

court noted, "[p]erhaps the greatest strength of the Banneker Program is that it is designed to remedy the effects of past injustices without interfering with the rights of others in the process." (App. 86a-87a.) "Banneker scholarships are awarded only after admission decisions are made, and they thus have no effect upon whether a student who is not African-American is able to attend UMCP." (App. 87a.) And because the program is a supplemental scholarship program supported by funds that would not be made available for other scholarship programs, no student "has suffered any appreciable monetary loss from the award of Banneker scholarships." (*Id.*) This program, which represents just one percent of the University's financial aid program, burdens no one, while at the same time providing a powerful incentive for high-achieving African-American students to accept the University's offer of admission.

The court of appeals invalidated this program using a version of "strict scrutiny" that no race-based scholarship program today could possibly survive. The court's decision has changed the law as it has been understood, in a way that will affect countless schools and students across the nation. Certiorari is warranted to clarify the applicability of this Court's prior decisions and to clarify the circumstances in which a university may offer race-based scholarships.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SCHOOL DESEGREGATION DECISIONS AND MISCONSTRUES ITS AFFIRMATIVE ACTION DECISIONS.

The court of appeals reversed the presumption and burden of proof applied in this Court's decisions fashioning remedies when findings of past discrimination

in education have been made. It exacerbated that error by holding that the Banneker Program is not narrowly tailored, even though it is undisputed that the Program has no effect on the admission of any student to the University and no appreciable effect on scholarship funds available to non-black students. The decision below substantially departs from, and conflicts with, this Court's precedents.

The court of appeals' decision was based upon a serious misreading of this Court's affirmative action cases -- in particular, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) -- and a complete disregard of the Court's decisions mandating the adoption of effective remedial measures when unlawful segregation or past discrimination in education has been established. In a series of decisions spanning four decades, this Court has regularly affirmed the implementation of sweeping remedial measures in elementary and secondary schools, in recognition of the extensive harm that arises from the denial of equal educational opportunity. *See, e.g., Green v. County School Bd. of New Kent County,* 391 U.S. 430, 437-38 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).[11] Similarly, this Court has held that race-conscious remedies affecting an entire system of public higher education are constitutionally *required* when state action traceable to prior discrimination continues to foster segregation. *See United States v. Fordice*, 112 S.Ct. 2727 (1992).

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[11] *See also Freeman v. Pitts,* 112 S.Ct. 1430, 1443 (1992); *Board of Educ. of Oklahoma City v. Dowell,* 111 S.Ct. 630, 638 (1991); *Milliken v. Bradley,* 433 U.S. 267, 280 (1977); *Keyes v. School District No. 1,* 413 U.S. 189, 200 (1973).

These are the decisions that control this case, for this action involves a state university that, as the district court painstakingly illustrated, was "racially segregated by law" for approximately 100 years and "actively resistant" to changing that condition "for at least twenty years thereafter." (App. 34a; *see also* 36a-49a.) The Banneker Program was not adopted in a vacuum. Rather, it is part of a much broader State effort to remedy past discrimination and to avoid severe and drastic federal sanctions threatened by the Department of Education's Office for Civil Rights, which previously found the State's higher education system to be unlawfully segregated. (App. 41a-49a; 110a-111a.) That federal agency has broad powers to order the remedying of the State's past discrimination, *see* 42 U.S.C. § 2000d-1; 34 C.F.R. §§ 100.3(b)(6)(i)-(ii), 100.5(h), and to this day continues to monitor the State's desegregation efforts because, in OCR's view, the State still operates a segregated higher education system. (App. 48 n.42.) *See also* 59 Fed. Reg. 4271 (1994) (notice stating OCR will apply the standards set out in *United States v. Fordice* when reviewing desegregation plans of Maryland and several other states).

This Court has recognized that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15. That flexibility also applies when findings of past discrimination are made by "administrative bodies [that] have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies." *Regents of the University of California v. Bakke*, 438 U.S. 265, 302 n.41 (1978). *See United Jewish Organizations of*

Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-66 (1977). In both situations, "[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 16, and to ensure that the vestiges of discrimination are "eliminated root and branch." *Green v. County School Bd. of New Kent County*, 391 U.S. at 438.

The court of appeals disregarded this Court's desegregation cases and the context out of which the Banneker Program arose, relying instead upon *Croson* and *Wygant*. Stating that "the University stands before us burdened with a presumption that its choice cannot be sustained" (App. 6a), the court of appeals held that *the University* "must, at a minimum, *prove* that the effect it proffers is caused by the past discrimination," and that its remedy is "narrowly tailored to meet the remedial goal." (App. 9a) (emphasis added). The court then applied these standards in a way that made the "presumption" of invalidity virtually irrebuttable.

The standards set out in *Croson* and *Wygant*, however, are not applicable in this case for two reasons. First, those cases, unlike this one, involved purely voluntary measures that were adopted in the absence of any findings of discrimination.[12] The presumption of invalidity that those cases apply to race-based classifications is inapplicable in cases such as this, in which there have been "judicial, legislative, or

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[12] *See Croson*, 488 U.S. at 505 ("none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry"); *Wygant*, 476 U.S. at 278 (no finding of discrimination by school board, which denied past discrimination in teacher hiring).

administrative findings of constitutional or statutory violations . . . ." *Bakke*, 438 U.S. at 307. Once "such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated." *Id*. at 308. Accordingly, in these cases, the "use of a racial classification to remedy th[e] violation [is] presumptively valid," *United States v. Paradise*, 480 U.S. 149, 193 n.2 (1987) (Stevens, J., concurring in judgment), as "the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined." *Bakke*, 438 U.S. at 308.

Therefore, "[t]he burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant* . . . and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which did not involve any proven violations of law." *United States v. Paradise*, 480 U.S. at 193 (Stevens, J., concurring in judgment). *See also United States v. Fordice*, 112 S.Ct. at 2743 (O'Connor, J., concurring) ("I write separately to emphasize that it is Mississippi's burden to prove that it has undone its prior segregation. . . ."). In these cases, "[a] party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.'" *United States v. Paradise*, 480 U.S. at 193 (Stevens, J., concurring in judgment). The court of appeals was wrong, therefore, in presuming that the Banneker Program is unlawful and in requiring the University to prove that its program was narrowly tailored to remedy the present effects of its past discrimination.

Second, the standards set out in *Croson* and

Wygant are also inappropriate here because those cases, unlike this one, involved race-based measures that imposed substantial burdens or disadvantages on members of the non-minority group. Those individuals lost contracts or employment for which they otherwise would have been eligible. Here, by contrast, respondent has never even attempted to argue that the Banneker Program has a comparable impact on non-black students, because the undisputed factual record shows that no such impact exists. As the district court stated, Banneker scholarships have "no effect" upon a non-Banneker student's ability to attend the University, "the Program consumes only 1% of the total financial aid budget at the University," and no non-Banneker student has suffered "any appreciable monetary loss" as a result of the Banneker Program. (App. 87a.) Thus, the district court concluded that the Banneker Program directly advances the goal of remedying the effects of the University's past exclusion of blacks "without interfering with the rights of others in the process." (*Id.*)

When the rights of innocent third parties are materially affected by a race-conscious remedy, it is appropriate to ask whether the remedy is "narrowly tailored" to prevent unnecessary harm to those individuals. *See, e.g., United States v. Paradise*, 480 U.S. at 182 (opinion of Brennan, J.), 187 (Powell, J., concurring); *Wygant*, 476 U.S. at 283. But when, as here, the rights of third parties are not appreciably affected -- or the impact, if any, is "so widely dispersed" and so "slight" -- there is no substantial question of narrow tailoring. *See Fullilove v. Klutznick*, 448 U.S. at 515 (Powell, J., concurring); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 597 (1990). In such a case, there can be greater flexibility in "balanc[ing] the individual and collective interests at stake . . . ." *United States v.*

Paradise, 480 U.S. at 185.

There are, in sum, fundamental differences between the standards that apply to truly *voluntary* affirmative action programs that confer benefits *at the expense* of innocent third parties, and those that apply to remedial programs that are based on *findings* of past discrimination and that have *no adverse impact* on other individuals. The court of appeals erred in failing to recognize these distinctions and in rigidly adhering to the standards set out in *Croson* and *Wygant*. That error directly determined the outcome of this case.

The court of appeals directed the entry of summary judgment in respondent's favor based upon its conclusion that the Banneker Program is not narrowly tailored. But that conclusion ignored the indisputable fact that the program has no substantial "impact . . . on the rights of third parties." *Paradise*, 480 U.S. at 171. The court of appeals did not even consider the impact that the Banneker Program has on non-black students. Had it done so, the court would have been obligated to find, as the district court did, that the Banneker Program is a narrowly tailored remedy for the University's past discrimination.

Instead of considering the Program's effect on non-blacks, the court of appeals held that the Program was not narrowly tailored largely because, in the court's view, the Program benefited the *wrong* blacks. Non-residents and "high achieving" blacks, the court stated, "are not the group against which the University discriminated in the past." (App. 20a.) This statement, however, ignores the University's undisputed prior exclusion of *all* blacks -- in-state, out-of-state, high-achieving and all others -- from

its campus.[13] It also conflicts with the well-settled principle that race-based relief may benefit "individuals who were not the actual victims of a defendant's discriminatory practices." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986). *See also Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 444-45 (1986); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1; *Green v. County School Bd. of New Kent County*, 391 U.S. 430.

The court of appeals' strong presumption of invalidity also affected the outcome of this case. The court, for example, rejected as a matter of law the University's proof that blacks were underrepresented in the student body because its statistical analysis had failed to "factor out . . . all nontrivial, non-race-based" explanations for the disparities that were identified. (App. 24a.) There are two significant flaws, however, in the court's reasoning.

First, it assumes incorrectly that the University has the burden to disprove all such non-discriminatory explanations.[14] As explained above, given the undisputed

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[13] This statement also ignores (1) that it was necessary for the University to recruit out-of-state blacks because of its poor reputation among Maryland blacks (J.A. 2907), and (2) that, as the district court found, attracting high-achieving black students to the University helps improve its reputation, increases the number of black students applying to UMCP, enhances the retention and graduation rates of blacks on campus, and helps reduce racial tensions. (App. 83a.)

[14] The court's rationale also conflicts with this Court's recognition that the effects of discrimination can give rise to remedial relief even though factors unrelated to that

(continued...)

evidence of past discrimination and OCR's findings, the burden should have been placed on the plaintiff to show that the remedy was unreasonable.

Second, even assuming that the University had the same burden of proof that would apply in the absence of such findings, that burden would be satisfied by *preliminary* proof demonstrating a *prima facie* case, *see Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 274-75, or by facts giving rise to "an *inference*" of continuing effects. *Croson*, 488 U.S. at 503, 509 (emphasis added); *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring).[15] When, as in this case, there are unchallenged findings of past discrimination, the University easily met any burden it had of showing continuing underrepresentation by demonstrating (a) that the percentage of incoming freshmen who were African-American was less than either the percentage of students taking the SAT in Maryland, the percentage with the minimum course curriculum required, or the percentage with the minimium math and verbal SAT scores; and (b) that African-American students leave the University in significantly

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[14](...continued)
discrimination may also influence a student's college choice and a college's racial identifiability. *See United States v. Fordice*, 112 S.Ct. at 2736.

[15] These standards of preliminary proof were applied in *Croson* and *Wygant* in deciding whether there had been any discrimination at all. Surely no heavier burden attaches to the question whether the conceded discrimination, once found to have existed, has continuing effects. The University's burden, if any, on that question should be lighter, both because proven discrimination changes the equities and because tracing lasting effects is more difficult than making an initial determination of discrimination.

greater numbers than students from any other racial group. (App. 63a-75a.) To require the University to disprove all "non-race-based" explanations for these disparities is to impose a greater burden than would have been warranted even in the absence of a finding of past discrimination.

The court of appeals' strong presumption of invalidity also affected its analysis of the other present effects relied upon by the University and the district court. Without questioning the undisputed fact that there is a racially hostile climate on the UMCP campus -- or the evidence that the University's history of past segregation could contribute to such a climate -- the court of appeals held, as a matter of law, that racial "tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland" because they are the product of "societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy." (App. 13a.) The court ignored the evidentiary record that the district court cited in finding that "the University's adverse racial climate is a legacy of its past discriminatory practices." (App. 79a.)

Finally, the court of appeals did not even question the district court's finding that past discrimination had contributed to the University's poor reputation among blacks -- another of the present effects relied upon by the University and the district court. That, the court of appeals held, "is not the kind of present effect that can justify a race-exclusive remedy." (App. 10a.) This Court has recognized, however, that a "reputation for discrimination may discourage minorities from seeking available employment." *Sheet Metal Workers v.*

E.E.O.C., 478 U.S. at 449. *See also* Part II, *infra*.[16] The court of appeals' presumption of invalidity was so strong that this effect was given no weight at all.

It is difficult to imagine how any affirmative action program could pass the test that the court of appeals constructed. Its decision has thrown both the law and countless remedial race-based scholarship programs into a state of confusion.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND WITH THE RECENT POLICY GUIDANCE OF THE UNITED STATES DEPARTMENT OF EDUCATION.

Review is also warranted because the court of appeals' decision conflicts with decisions of other courts of appeals and with the policy of the federal government.

The court of appeals held that the district court's findings of a poor reputation in the black community and a hostile campus climate for blacks are insufficient, as a

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[16] One need not resort "to history books", as the court of appeals suggested, to be affected by the University's past discrimination. (App. 10a.) The longstanding historical violation that preceded the Banneker Program only ended recently and continues to manifest itself in many ways, affecting, for example, parents and high school counselors who were excluded from the University and now influence students' college choices. (App. 54a-60a.) As the district court candidly stated, "history contributes mightily to our prejudices, and it is at best naive and at worst disingenuous to suggest that a culture of bigotry inculcated over centuries can be erased by less than twenty years of ameliorative measures." (App. 91a.)

matter of law, to justify the Banneker Program. (App. 9a-13a.) The Eleventh Circuit has expressly recognized, however, that "a university that maintains a climate traceable to segregation with continuing segregative effects must remedy the climate to the extent that such can be done in a practicable and educationally sound manner." *Knight v. Alabama*, 14 F.3d 1534, 1553 (11th Cir. 1994). Courts of appeals in the Fifth and Eighth Circuits have also reached decisions contrary to the decision below. *See Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974) ("[W]e are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi."); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) ("Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis.").

In addition, the court of appeals' first decision in this case conflicts with other federal circuit court decisions.[17] In *Podberesky I*, the court of appeals held that OCR's findings that the State maintained a racially-segregated higher education system in violation of federal law did not provide a constitutionally sufficient justification for the Banneker Program, even though OCR

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[17] Although the University did not seek immediate review of the court of appeals' decision in *Podberesky I*, it may now. *See Sheet Metal Workers v. E.E.O.C.*, 478 U.S. at 444 n.24.

had continued to monitor the State's efforts to eliminate the vestiges of past discrimination at the time respondent was admitted to the University. (App. 103a-106a.) By contrast, the Eighth, Eleventh, and Sixth Circuits have upheld the validity of race-based remedial action implemented under circumstances virtually identical to those under which the Banneker Program arose. *See Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (holding that OCR's findings of past discrimination justified race-conscious remedies implemented to eliminate the discriminatory effects of Arkansas's racially-segregated higher education system); *Palmer v. District Board of Trustees of St. Petersburg Junior College*, 748 F.2d 595 (11th Cir. 1984) (same with respect to Florida's higher education system); *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986) (blacks-only graduate admission program justified by findings of discrimination and continuing federal oversight).

The court of appeals' judgment in this case also conflicts with the February 17, 1994 Policy Guidance of the U.S. Department of Education, which embraces the approach that the district court adopted and encourages colleges and universities to award race-targeted scholarships in several enumerated circumstances, including (a) when a State seeks to remedy its own past discriminatory conduct or discrimination at higher education institutions in that State, and (b) when a college or university seeks to attain a diverse student body. *See* 59 Fed. Reg. 8759-62. Respondent acknowledged this conflict below, but argued that the conflict is insignificant because "the DOE policy is inconsistent with existing case law. . . ." November 23, 1994 Response to Petition for Rehearing at 8. On the contrary, the court of appeals' decision conflicts with existing case law and invalidates a scholarship program that another branch of the federal

government would specifically allow at UMCP and at other colleges and universities throughout the nation.

Review is warranted to resolve these conflicts between the court of appeals' decisions and the law of other circuits and the policy of the United States government.

III. THE COURT OF APPEALS MISCONSTRUED THIS COURT'S DECISION IN *BAKKE* TO PROHIBIT THE USE OF RACE-BASED SCHOLARSHIPS TO ATTAIN A DIVERSE STUDENT BODY.

This case also presents the important question whether, even in the absence of unlawful discrimination, race-based scholarships may be employed to achieve a diverse student body. This Court has recognized that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated. . . ." *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. at 568 (*quoting Bakke*, 438 U.S. at 311-13). The interest in racial diversity is "sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). The University relied upon its compelling interest in diversity as an additional basis for the Banneker Program. (App. 213a.)

The holding of *Bakke*, as determined by Justice Powell's opinion, was that race may be used as a factor, but not as a prerequisite, in college or university *admissions* decisions. *Bakke* does not address, however,

whether race may be used as a prerequisite in *scholarship* programs to further the goal of diversity. Race-based scholarship programs such as the Banneker Program are different from race-based admissions programs in two critical respects.

First, the respective impacts that admissions and scholarship programs have on non-minorities are substantially different. As the district court found, the Banneker Program awards scholarships only after admission decisions are made and thus has "no effect" on a non-black student's ability to attend the University. (App. 87a.)

Second, the evidence shows that there is no less restrictive, yet equally effective, alternative to race-exclusive scholarships as a means of advancing the compelling interest in diversity. In *Bakke*, Justice Powell, after analyzing the experience of Harvard and other universities that had used race as a *factor* in admissions, concluded that using race as a *requirement* was unnecessary to accomplish diversity. *See* 438 U.S. at 317-19. In this case, by contrast, the uncontroverted evidence from college and university presidents and administrators shows that using race as a mere factor in a scholarship program will not be as effective in promoting student diversity. (J.A. 3023; 3028; 3060.)

The United States Department of Education has acknowledged that judgment. Noting that there are "important differences between admissions and financial aid," 59 Fed. Reg. 8762, the Department has expressed its agreement with the "many colleges [that] submitted comments arguing that the use of race or national origin as a plus factor in awarding financial aid may be

inadequate to achieve diversity." *Id.* at 8761.[18] Those expert judgments are entitled to considerable weight, particularly absent any adverse impact of the Banneker Program on non-black students. *Cf. Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225-26 & n.12 (1985); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

The court of appeals implicitly rejected these distinctions between race-based admissions and scholarship programs. In its first opinion, the court cited *Bakke* and noted that "[i]n this case, the scholarship funds are set aside for black students only . . . ." (App. 103a-104a n.4.) The court added that "ethnic diversity does not appear to be the real interest behind the program." (*Id.*) Following remand, however, the University explicitly found in further administrative proceedings that the Banneker Program advanced two important interests: remedying past discrimination and achieving diversity. (App. 139a; 157a; 164a; 213a.) Both rationales were asserted in the courts below. The district court found it unnecessary to address the diversity argument, however, and the court of appeals implicitly rejected it by ignoring the University's request for a remand to permit the district court to address the issue. That issue has been clearly raised and preserved, and review is warranted to resolve finally whether a race-based scholarship program is a constitutionally legitimate means of advancing the

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[18] *See also* "Minority Designated Scholarship Programs, A Compilation of Available Data on the Scope and Extent of Programs," American Council on Education, 1991 (63% of higher education institutions surveyed consider minority-based financial aid programs to be very important in attracting and retaining minority students).

goal of educational diversity.[19]

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Following review, the judgment should be reversed.

Respectfully submitted,

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[19] At the very least, this Court should remand this case with instructions that the diversity argument be addressed.